BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

SUSAN G. POWERS
(Claimant)

PRECEDENT
DISABILITY DECISION
No. P-D-416
Case No. D-80-130

S.S.A. No.

XEROX CORPORATION
(Self-Insurer)

Voluntary Plan No. (Not Shown)

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. LB-DC-7212

The Department has appealed from the decision of the administrative law judge which held that the Department, rather than the voluntary plan insurer, was liable for unemployment compensation disability benefits paid to the claimant under the Unemployment Insurance Code.

STATEMENT OF FACTS

The claimant was employed as a receptionist for the employer from January 15, 1979 until November 2, 1979, when she resigned her employment. During the course of her employment the claimant's duties required her to greet the public, perform clerical work, answer the switchboard, monitor exits and entries to and from the office, and other general office tasks. The job did not impose any undue stress on the claimant.

When the claimant left her employment on November 2, 1979, she did not apply for a leave of absence since she did not intend to return to work for the employer after delivery.

When the claimant resigned she was still able to perform her work. She mistakenly believed that she was in her eighth month of pregnancy; actually, she was in her seventh month. The claimant, a young woman, had no unusual problems from her pregnancy and had not been advised by her physician to leave her work. The claimant thought "that it was about time to go," because of the impending birth of her child. Her physician agreed.

On November 14, 1979 the claimant signed her claim for disability. She gave birth to a boy on January 12, 1980. The claimant's doctor certified that she first became disabled as a result of her pregnancy on November 5, 1979.

On January 15, 1980, the claimant filed her claim for unemployment compensation disability benefits with the Employment Development Department. The Department determined the claimant was eligible for benefits commencing November 5, 1979 and that she was entitled to benefits under the voluntary plan of the employer. Accordingly, the Department forwarded the claim forms to the voluntary plan. The voluntary plan denied coverage. The Department commenced the payment of benefits to the claimant and filed an appeal to the denial of coverage by the voluntary plan.

The employer has an approved, self-insured voluntary plan for unemployment compensation disability benefits. Paragraph VI of that contract specifies when coverage is terminated as follows:

"TERMINATION OF INDIVIDUAL EMPLOYEE COVERAGE

An employee's coverage will terminate on the earliest of the following:

1. On date of termination of employee-employer relationship;

2. On the 15th day following a leave of absence without pay or layoff without pay;

3. On the date he ceases to be a California employee; or,

4. As to the beginning of any calendar quarter following the giving of such notice of termination in writing."

The position of the employer is that coverage under the voluntary plan ceased under subdivision 1 of paragraph VI as of November 2, 1979 when the claimant terminated her employment. The Department contends that the termination of coverage provisions do not apply where a claimant leaves her employment during pregnancy. The Department relies on Appeals Board Decisions Nos. P-D-149 and P-D-397 for its position.

REASONS FOR DECISION

Section 2626 of the code provides that an individual is disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work.

Section 2712 of the code provides that where a claimant is entitled to disability benefits but there is a dispute whether such benefits are payable from the Disability Fund or a voluntary plan, benefits shall be paid from the source against which the claim was first filed pending determination of the coverage question. If it is finally determined that the benefits should have been paid from a source other than the one which paid the benefits, reimbursement shall be promptly made from the Disability Fund or from the voluntary plan, as the case may be, and the claimant promptly paid the accumulated excess, if any, to which he is entitled.

Subdivision (a) of section 2626, as amended by Chapter 633, Stats. 1979, defines "disability" or "disabled" with respect to periods of disability existing on or after April 29, 1979 to include:

> "Illness or injury, whether physical or mental, including any illness or injury resulting from pregnancy, childbirth, or related medical condition."

Prior to the 1979 amendment, subdivision (a) of section 2626 defined "disability" or "disabled" to include pregnancy to the extent specified in section 2626.2 (now

repealed) which generally provided benefits relating to pregnancy would be paid upon a doctor's certification that the claimant was disabled because of an abnormal and involuntary complication of pregnancy, a condition possibly arising out of pregnancy that would disable a claimant without regard to the pregnancy, or upon a doctor's certification that the claimant is disabled because of a normal pregnancy for a period not to exceed three weeks immediately prior to the expected birth of a child, and for a period not to exceed three weeks immediately after the termination date of a normal pregnancy.

In Appeals Board Decision No. P-D-149 this Board held that it was not necessary for a claimant to be incapacitated or disabled from performing her work at the time she left her employment before liability will attach for a disability commencing after four weeks from the date of the termination of her pregnancy. Since, at that time, a claimant would be eligible under the State Disability Fund, it was reasoned that a denial of coverage under the voluntary plan would render the voluntary plan less favorable in coverage than under the Disability Fund. This would be contrary to law (subdivision (a) of section 3254 of the code, formerly subdivision (a) of section 451 of the Unemployment Insurance Act).

In Appeals Board Decision No. P-D-397 it was held that the legislature, by the passage of subdivision (c) of section 2626.2 effective January 1, 1977 (and now repealed) the legislature intended that up to six weeks of benefits were payable for a normal pregnancy. The Board stated that a voluntary plan contract cannot be interpreted in such a manner as to shift the obligation to the State Disability Fund when the law requires that the voluntary plan benefit obligations are to be at least equal to those of the Disability Fund. The decision emphasized that if the termination of coverage provisions of the voluntary plan were allowed to apply in a pregnancy situation, the six weeks of liability for normal pregnancy provisions of a voluntary plan would be virtually nullified. The date of delivery would invariably be beyond the 15-day period of leave of absence without pay (which was the situation in that case) after which time the voluntary plan coverage would terminate.

The legislative purpose in amending section 2626 of the code in 1979 was to establish entitlement to disability benefits for a disability involving normal

pregnancy existing on or after April 29, 1979 on the same bases as eligibility for benefits for any other disability. That section provides that benefits shall be payable when the claimant is unable to perform her regular or customary work. Accordingly, benefits for a disability involving normal pregnancy are now to be paid on the same basis as any other disability. Therefore, if a claimant leaves employment because she is unable to perform her regular or customary work due to an illness or injury resulting from pregnancy while covered under a voluntary plan, she is "disabled" at that time and the voluntary plan is on the risk. However, if the claimant leaves her employment, which she is able to perform, and thereafter becomes disabled due to her pregnancy, the voluntary plan would not be on the risk.

In the instant case, the claimant last worked on November 2, 1979. She was able to perform her regular or customary work at that time. She terminated her employment in concert with her physician's advice that it would be a good time to quit in order to spend the latter period of her pregnancy away from her work environment. This was a decision based upon personal preference rather than physical need. She did not leave work due to any illness or injury occasioned by her pregnancy. As of November 2, 1979, the claimant could not be held to be "disabled" under section 2626 of the code. In these circumstances she would not have been entitled to disability benefits from either the voluntary plan or the State Disability Fund as of the date of separation.

It is clear that the claimant left work on November 2, 1979 for reasons other than a disability due to her pregnancy. The first day that she was too ill to work was November 5, 1979. Coverage under the voluntary plan contract ceased as of November 2, 1979 when she resigned from her job. Since the claimant's disability commenced after the termination of coverage under the voluntary plan, the voluntary plan is not liable for the payment of disability benefits paid to the claimant.

It is apparent that the legislative changes have largely overtaken and rendered inapplicable the rationale of this Board in Appeals Board Decisions Nos. P-D-149 and P-D-397. In this posture it is appropriate that to the extent that those cases are not in consonance with our decision in the instant matter they are overruled.

DECISION

The decision of the administrative law judge is affirmed. Benefits are payable from the Disability Fund rather than under the voluntary plan contract.

Sacramento, California, November 14, 1980.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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